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IN THE

Supreme Court of the United States

ABDELA TUM, *et al.*,
Petitioners,

v.

BARBER FOODS, INC., d/b/a BARBER FOODS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE NATIONAL CHICKEN COUNCIL AND AMERICAN MEAT INSTITUTE AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

Under section 4(a) of the Portal-to-Portal Act of 1947, an employer's obligation to pay wages under the Fair Labor Standards Act of 1938 ("FLSA") does not include time an employee spends "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" or time which an employee spends engaged in "activities which are preliminary to or postliminary to said principal activity or activities." 29 U.S.C. § 254(a).

This brief for *amici curiae* will address the following questions presented:

1. Is the walking that occurs between compensable pre and post-shift clothes-changing and the time employees arrive at or depart from their actual workstations non-compensable "walking . . . to and from the actual place of performance of the principal activity or activities which such employee[s] [are] employed to perform" within the meaning of section 4(a)(1)?

2. Under the FLSA, as amended by the Portal-to-Portal Act, are employees entitled to compensation for time spent waiting to obtain sanitary or protective attire?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. PETITIONERS ARE ADVOCATING A RETURN TO THE HOLDING OF *MT. CLEMENS POTTERY* WHICH WAS LEGISLATIVELY OVERRULED BY THE PORTAL-TO-PORTAL ACT	4
II. THE COURT'S OPINION IN *STEINER V. MITCHELL* PROVIDES NO SUPPORT FOR THE REDEFINITION OF THE COMPENSABLE WORKDAY ADVOCATED BY PETITIONERS	10
A. The Rationale of *Steiner* Cannot Be Applied to Section 4(a)(1) Activities Such As "Walking"	10
B. The Walking and Waiting Time At Issue Are Noncompensable Preliminary And Postliminary Activities Under Section 4(a)(2)	11
III. NONE OF THE VARYING RATIONALES OFFERED IN SUPPORT OF PETITIONERS' ADVOCATED RETURN TO THE REJECTED REASONING OF *MT. CLEMENS POTTERY* ARE SUPPORTED BY THE LANGUAGE OF THE STATUTE	15

TABLE OF CONTENTS—Continued

Page

A. The Statute Does Not Support The "First Principal Activity" Standard Advocated By Petitioners 15

B. There Is No "Continuous Workday Rule" Which Compels The Interpretation Of The Act Advocated By Petitioners 18

IV. THE "FIRST PRINCIPAL ACTIVITY" OR "CONTINUOUS WORKDAY" STANDARDS ADVOCATED BY PETITIONERS WOULD ERADICATE THE *DE MINIMIS* RULE 22

CONCLUSION 25

TABLE OF AUTHORITIES

CASES Page

Adams v. United States, 10 WH Cases 2d 1000, (1014) (Fed. Cl. 2005) 19
Aguilar v. United States, 36 Fed. Cl. 560, 566 (1996) 14
Aiken v. City of Memphis, 190 F.3d 753, 758 (6th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000).. 19, 23
Alvarez v. IBP, Inc., 339 F.3d 894, 907 (9th Cir. 2003), *cert. granted*, 125 S. Ct. 1295 (2005)...2, 18, 25
Anderson v. Mt. Clemens Pottery, Co., 328 U.S. 680 (1946) 3, 4
Anderson v. Pilgrim's Pride Corp., 147 F. Supp. 2d 556 (E.D. Tex. 2001), *aff'd* 44 Fed. Appx. 652 (5th Cir. 2002) 8, 16, 18
Bagrowski v. Md. Port Auth., 845 F. Supp. 1116 (D. Md. 1994) 8
Barrentine v. Arkansas-Best Freight Sys., Inc., 750 F.2d 47 (8th Cir. 1984) 8
Bateman v. Ford Motor Co., 76 F. Supp. 178 (E.D. Mich. 1948), *aff'd sub nom Fisch v. Gen. Motors Corp.*, 169 F.2d 266 (6th Cir. 1948), *cert. denied*, 335 U.S. 902 (1949) 5
Bejil v. Ethicon Inc., 269 F.3d 477 (5th Cir. 2001) 8
Blum v. Great Lakes Carbon Corp., 418 F.2d 283 (5th Cir. 1969) 9
Bobo v. United States, 136 F.3d 1465 (Fed. Cir. 1998) 19
Carter v. Panama Canal Co., 463 F.2d 1289 (D.C. Cir. 1972) 7, 9
Cherup v. Pittsburgh Plate Glass Co., 350 F. Supp. 386 (N.D. W. Va. 1972), *aff'd* 480 F.2d 921 (4th Cir. 1973) 9

TABLE OF AUTHORITIES—Continued

	Page
De Ascencio v. Tyson Foods, Inc., 342 F.3d 301 (3rd Cir. 2003)	8
Dooley v. Liberty Mutual Ins. Co., 307 F.Supp. 2d 234 (D. Mass. 2004)	19
Dunlop v. City Elec., Inc., 527 F.2d 394 (5th Cir. 1976)	8
Gonzalez v. Farmington Foods, Inc., 296 F. Supp. 2d 912 (N.D. Ill. 2003)	8
Graham v. City of Chicago, 828 F.Supp. 576 (N.D. Ill. 1993)	19, 20
Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 161 (1945)	4
Jewell Ridge Coal Corp., 325 U.S. at 169, 176	24
Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984)	8, 23
Nardone v. Gen. Motors, Inc., 207 F. Supp. 336 (D.N.J. 1962)	9
North-Western-Hanna Fuel Co. v. McComb, 166 F.2d 932 (8th Cir. 1948)	5
Pressley v. Sanderson Farms, Inc., 143 Lab Cas (CCH) ¶ 34,262 (S.D. Tex. Apr. 23, 2001), *aff'd without published opinions* 33 Fed. Appx. 705 (5th Cir. Mar. 7, 2002)	8
Ralph v. Tidewater Constr. Corp., 361 F.2d 806 (4th Cir. 1966)	7, 9
Reich v. IBP, Inc., 38 F.3d 1123 (1st Cir. 1994)	*passim*
Reich v. IBP, Inc., 820 F. Supp. 1315 (D. Kan. 1993)	5, 14
Reich v. Monfort, Inc., 144 F.3d 1329 (10th Cir. 1998)	8
Reich v. N.Y. City Transit Auth., 45 F.3d 646 (2nd Cir. 1995)	*passim*
Steiner v. Mitchell, 215 F.2d 171 (6th Cir. 1954)	*passim*

TABLE OF AUTHORITIES—Continued

Page

Steiner v. Mitchell, 350 U.S. 247 (1956) ..... *passim*

Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944) 4

Tum v. Barber Foods, Inc., 360 F.3d 274 (1st Cir. 2004), *cert. granted*, 125 S. Ct. 1295 (2005) ..... *passim*

United States v. Cook, 795 F.2d 987 (Fed. Cir. 1986) 5

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 22

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BRIEF OF THE NATIONAL CHICKEN COUNCIL AND AMERICAN MEAT INSTITUTE AS *AMICI CURIAE* SUPPORTING RESPONDENT

INTEREST OF THE *AMICI CURIAE* [1]

The National Chicken Council ("NCC") is the primary trade organization representing the poultry industry in the United States. The member companies of NCC produce and process about 95 percent of meat-type chickens marketed and employ in excess of 350,000 workers throughout the United States.

[1] The consents of the parties have been filed with the Clerk of Court. Pursuant to Rule 37.6, *amici* NCC and AMI state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *Amici*, has made a monetary contribution to the preparation of submission of this brief.

The American Meat Institute ("AMI") is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey and processed meat products. AMI member companies produce more than 95 percent of meat products available in the United States. There are more than 200,000 workers employed in the meat packing and processing industries in the United States. AMI has represented the interests of the meat packing and processing community since the Federal Meat Inspection Act was passed in 1906.

Each of the *amici* noted above has a compelling interest in the issues presented in this case. Petitioners and their supporting *amici* urge the court to hold that the walking and waiting time at issue in this case is compensable. We disagree. Such a holding would reverse many years of precedent and would affect timekeeping practices and systems in place throughout almost all types of public and private employment. Such a holding would create immense liabilities for employers who are members of the *amici* organizations resulting from both litigation and costs associated with developing and implementing new timekeeping systems and practices.

The plaintiffs in the cases under review, *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004) (No. 04-66) and *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003) (No. 03-1238), urge an interpretation of the FLSA which would undermine the 1947 Portal-to-Portal Act and would upend the payroll and timekeeping practices of almost all employers in order to achieve the illusory benefit of a temporary windfall for the plaintiffs in these and other similar cases. The interpretation urged by petitioners and supporting *amici* in this case is contrary to the congressional intent and clear language of the Portal-to-Portal Act. NCC and AMI accordingly submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

In this case, petitioners and the *amici* parties supporting petitioners contend that poultry and meat processing employees are entitled to compensation for time spent walking to and from their workstations. It is also argued to the Court that time spent waiting to obtain certain sanitary or protective attire is compensable activity under the Fair Labor Standards Act (hereinafter "FLSA"). petitioners and the *amici* parties who have filed a brief in support of the petitioners are thereby urging this court to return to the rejected holding of *Anderson v. Mt. Clemens Pottery, Co.*, 328 U.S. 680 (1946), which was expressly overruled by the Portal-to-Portal Act of 1947.

Petitioners and supporting *amici* advocate an expansion of the compensable workday that would profoundly affect the timekeeping practices, policies and systems of a broad range of employers in both public and private employment. To achieve this end the Court is urged to define the compensable workday based upon the first and last compensable activity. These arguments, however, are based upon a misapplication of the court's opinion in *Steiner v. Mitchell*, 350 U.S. 247 (1956), are contrary to the Secretary of Labor's (hereinafter "Secretary") interpretive regulations and, most importantly, are contrary to the language and clear purpose of the Portal-to-Portal Act.

The standard advocated by petitioners and their supporting *amici* would create the same substantial and unanticipated liabilities which the Portal-to-Portal amendments were enacted to prevent and would, moreover, abolish the *de minimis* rule which has a long history under the FLSA.

If the concept of the compensable workday under the FLSA is expanded as advocated by petitioners in this case, employers would face claims for walking time following what is considered to be the first compensable pre-shift activity and walking time preceding the last compensable post-shift activ-

ity at the conclusion of the day. The sanitary and protective attire at issue in this case is common to many types of employment. Any employer that employs individuals who wear common types of sanitary or protective attire would be subject to claims for waiting, walking and travel associated with obtaining, donning, doffing or disposing of such attire.

The arguments advanced in support of petitioners' position in this case seek to achieve an end run around the clear language and express purpose of the Portal-to-Portal Act and to eradicate the concept of "*de minimis*" activities from FLSA jurisprudence. Such a radical redefinition of terms commonly applied under the FLSA would require congressional action.

ARGUMENT

I. PETITIONERS ARE ADVOCATING A RETURN TO THE HOLDING OF *MT. CLEMENS POTTERY* WHICH WAS LEGISLATIVELY OVERRULED BY THE PORTAL-TO-PORTAL ACT.

In *Anderson v. Mt. Clemens Pottery, Co.*, 328 U.S. 680 (1946), the definition of "work" under the FLSA was extended to include time spent by employees walking to and from their workstations and time spent in ancillary activities at workstations before and after shift. The *Mt. Clemens* Court concluded that walking to a workstation required an employee to be on the employer's premises and that without the employee walking to the workstation, the "productive aims of the employer" could not have been met. *Id.* at 691. The Court concluded that walking constituted "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Id.* at 691-92 (footnote omitted) (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944), and *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 164-66 (1945)).

Congress acted immediately to overturn the *Mt. Clemens* decision. In its next session in 1947, Congress passed the Portal-to-Portal Act with the express purpose of foreclosing "portal-to-portal" pay claims seeking compensation for the time from the instant an employee sets foot on the employer's premises to the time of departure. It has been widely recognized that the Portal-to-Portal Act was a direct congressional response designed to nullify the *Mt. Clemens* decision. *See, e.g., Steiner v. Mitchell*, 350 U.S. 247, 253 (1956) (stating that the Portal-to-Portal Act was designed to meet an emergency resulting from the employee claims arising from the *Mt. Clemens* decision, which, if allowed to continue, would have created "wholly unexpected liabilities" to employers that were "immense in amount"); *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004), *cert. granted*, 125 S. Ct. 1295 (2005) (observing that the purpose of the Portal-to-Portal Act was "to exclude preliminary and postliminary waiting and walking time from compensability); *Reich v. IBP, Inc.*, 820 F. Supp. 1315, 1323 (D. Kan. 1993) *modified and vacated in part by* 1 Wage & Hour Cas. 2d (BNA) 863 (D. Kan. June 2, 1993), *aff'd and remanded by* 38 F.3d 1123 (10th Cir. 1994), (stating that "[t]he legislative history of the Portal Act indicates that preliminary activities such as those held to be compensable in *Mt. Clemens* are no longer compensable under FLSA"); *United States v. Cook*, 795 F.2d 987 (Fed. Cir. 1986) (observing that intent of Portal-to-Portal Act was to prevent thousands of lawsuits to recover wages for time workers were in transit to and from workstations); *North-Western-Hanna Fuel Co. v. McComb*, 166 F.2d 932 (8th Cir. 1948) (stating that it was common knowledge that congressional intent was to cut off vast amount of unforeseen damages some Supreme Court decisions created to the detriment of employers); *Bateman v. Ford Motor Co.*, 76 F. Supp. 178 (E.D. Mich. 1948), *aff'd sub nom Fisch v. Gen. Motors Corp.*, 169 F.2d 266 (6th Cir. 1948), *cert. denied*, 335 U.S. 902 (1949) (stating that the "main purpose" of the Portal-to-Portal

Act was to prevent employees' claims for time spent "walking, washing, punching the clock, changing clothes, etc."). In contending that walking time is compensable in the present case, the petitioners are urging this Court to turn back the clock to pre-1947 reasoning which would create enormous and unforeseen liabilities and would also require wholesale revisions to timekeeping practices and systems throughout all types of public and private employment.

The congressional purpose motivating the enactment of the Portal-to-Portal Act could not have been made more clear. Section 1 of the Act states that:

> The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation . . . 29 U.S.C. § 251(a).

The Portal-to-Portal Act makes expressly clear that time spent walking, as well as time spent performing other preliminary or postliminary activities, is "not compensable." The Act provides:

> **(a) Activities not compensable**
>
> Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

> (2) activities which are preliminary to or postliminary to said principal activity or activities.
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a) (Supp. 1997).

This section of the Portal-to-Portal Act makes clear that the Portal-to-Portal Act excludes not only "preliminary" and "postliminary" activities as generally defined by subsection (a)(2), but also expressly excludes the "walking" time (subsection (a)(1)) at issue in this litigation.

The contention that the walking time at issue in this case is compensable notwithstanding the clear language of the Portal-to-Portal Act is an attack on longstanding precedent and timekeeping practices based upon such precedent. Applying the Portal-to-Portal Act, courts have concluded that even significant time spent walking or otherwise traveling to and from a work site is not compensable, even where such travel occurs on the employer's property. In *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972), locomotive operators employed on locks operated by the Panama Canal Company were required to be on board their locomotive at the beginning of their shift. Prior to their shift, the operators were required to check an assignment board and then walk 2 to 15 minutes to reach their locomotive, depending upon the location of the locomotive to which they were assigned. *Id.* at 1291. The court concluded that the principal activity of the operators was operation of the locomotive, and the actual place of performance of their work was the locomotive itself. *Id.* at 1294. The court found "little room for question" that the locomotive operators' claim for compensation for time spent walking to and from their locomotives were "precluded by the Portal-to-Portal Act." *Id.* at 1292. Similarly, in *Ralph v. Tidewater Constr. Corp.*, 361 F.2d 806 (4th Cir. 1966),

operating engineers and ironworkers employed in the construction of the Chesapeake Bay bridge sought compensation for a daily boat ride to their work site,, which required 15 minutes to 1 hour each way. The Fourth Circuit found that claims for such compensation were specifically precluded by section 4(a) of the Portal-to-Portal Act.. *Id.* at 808-09; 29 U.S.C. § 254(a).

That the interpretation of the FLSA advocated by petitioners would require wholesale revision of timekeeping practices throughout a wide range of public and private employment is demonstrated by the wide variety of employers who have faced similar claims. Such claims have been pervasive in meat and poultry processing. *See, e.g., De Ascencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3rd Cir. 2003); *Reich v. Monfort, Inc.*, 144 F.3d 1329 (10th Cir. 1998); *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp. 2d 912 (N.D. Ill. 2003); *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002); *Pressley v. Sanderson Farms, Inc.*, 143 Lab Cas (CCH) ¶ 34,262 (S.D. Tex. Apr. 23, 2001), *aff'd without publisshed opinion* 33 Fed. Appx. 705 (5th Cir. Mar. 7, 2002). Such claims similarly have been asserted against a wide varietty of public and private employers. *See, e.g., Bejil v. Ethicon Inc.*, 269 F.3d 477 (5th Cir. 2001) (claims for donning and doffing of outer garments by employees engaged in the manufacture of medical supplies); *Bagrowski v. Md. Port Auth.*, 845 F. Supp. 1116 (D. Md. 1994) (claim by Port Authority police officers for time spent donning uniforms); *Reich v. N.Y. City Transit Auth.*, 45 F.3d 646 (2nd Cir. 1995) (Transit Authority police officers asserted claims for dog handling duties and commuting time before and after their regular work shift); *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984) (claims for pre-shift activities by employees of Army Corps of Engineers who operated hydroelectric facilities); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47 (8th Cir. 1984) (truck drivers asserted claim for pre-trip activities); *Dunlop v. City Elec.*,

Inc., 527 F.2d 394 (5th Cir. 1976) (claims asserted by electricians for compensation for various pre-shift activities); *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972) (locomotive engineers sought compensation for walking time prior to shift); *Blum v. Great Lakes Carbon Corp.*, 418 F.2d 283 (5th Cir. 1969) (employees engaged in manufacture of carbon sought compensation for time spent performing post-shift activities); *Ralph v. Tidewater Constr. Corp.*, 361 F.2d 806 (4th Cir. 1966) (operating engineers and iron workers employed in construction of Chesapeake Bay Bridge sought compensation for daily boat trip to and from place of work); *Cherup v. Pittsburgh Plate Glass Co.*, 350 F. Supp. 386 (N.D. W. Va. 1972), *aff'd by* 480 F.2d 921 (4th Cir. 1973) (chlorine manufacturing employees sought compensation for pre- and post-shift clothes changing); and *Nardone v. Gen. Motors, Inc.*, 207 F. Supp. 336 (D.N.J. 1962) (claims for pre-and post-shift activities of automotive manufacturing employees). Recent claims asserted against Honda Manufacturing of Alabama and Mercedes-Benz U.S. International for compensation for pre-shift and post-shift activities demonstrate the continued and rapidly growing prevalence of these issues in an ever-expanding diverse range of industries. Daily Labor Report (BNA) p. A-8 (Jan. 9, 2003); Daily Labor Report (BNA) p. A-5 (Apr. 4, 2003).

The drastic redefinition of the compensable workday advocated by petitioners would create large and unforeseen liabilities for both public and private employers. In fact, any employer that employs individuals who wear common types of protective attire may be subject to claims for walking and travel time associated with obtaining, donning, doffing, or disposing of such attire. As the First Circuit recognized below, unless walking time is excluded by the Portal-to-Portal Act, "an almost endless number of activities that precipitate the employees' essential tasks would be compensable." *Tum*, 360 F.3d at 282. Additionally, police officers and other public employees required to wear some type of uniform will

likely seek compensation for walking or travel time following allegedly compensable donning activities or preceding allegedly compensable doffing activities. The unanticipated burden such claims would create for state and local governments would be substantial.

II. THE COURT'S OPINION IN *STEINER V. MITCHELL* PROVIDES NO SUPPORT FOR THE REDEFINITION OF THE COMPENSABLE WORKDAY ADVOCATED BY PETITIONERS.

Petitioners and supporting *amici* rely principally upon this Court's decision in *Steiner v. Mitchell*, 350 U.S. 247 (1956). In *Steiner* the employees worked in a storage battery plant where they were exposed to lead, acid and other caustic and toxic substances and were required by their employer to spend approximately 30 minutes per day changing clothes and showering at the end of the shift. *Id.* at 248. Interpreting the general definition of preliminary and postliminary activities in section 4(a)(2) of the Portal-to-Portal Act (but, significantly not the express and specific language of section 4(a)(1)), the Court found that, under the extreme circumstances present in battery manufacturing, the clothes changing and showering were "integral and indispensable" to the employees' principal activities and were therefore compensable. *Id.* at 249. The Court recognized, however, that under section 4(a)(2) clothes changing and showering would not be compensable in "normal" circumstances. *Id.*

A. The Rationale of *Steiner* Cannot Be Applied to Section 4(a)(1) Activities Such As "Walking"

Section 4(a)(1) of the Portal-to-Portal Act specifically identifies as "[a]ctivities not compensable" "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1).

The Court in *Steiner* did not address walking time and in fact made clear that the "integral and indispensable" analysis had no application to activities such as walking that are expressly excluded by section 4(a)(1). The Court held in *Steiner* that:

> activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are *not specifically excluded by section 4(a)(1).*

350 U.S. at 256. (Emphasis added) Therefore, only where an otherwise preliminary or postliminary activity is both "integral and indispensable" and not within the exclusion of section 4(a)(1) can it be argued under *Steiner* that such an activity is compensable. Because the walking time at issue in this litigation is clearly "walking" it is not compensable under the rationale of *Steiner* or any other interpretation of the Portal-to-Portal Act.

B. The Walking And Waiting Time At Issue Are Noncompensable Preliminary And Postliminary Activities Under Section 4(a)(2)

Even if section 4(a)(1) of the Portal-to-Portal Act did not expressly exclude the walking time at issue in this litigation, such walking time would nevertheless be excluded as preliminary and postliminary activities. Section 4(a)(2) provides that "activities which are preliminary and postliminary to said principal activity or activities" are not compensable. 29 U.S.C. § 254(a)(2). The waiting time at issue in this case is, moreover, clearly a noncompensable preliminary and postliminary activity under section 4(a)(2).

The regulations promulgated following the Portal-to-Portal Act allow no other interpretation of the statute. 29 C.F.R. § 790.7 (2003) provides in relevant part:

> (f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities. . . .
>
> (g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.

29 C.F.R. § 790.7 (f) & (g) (footnote omitted) (Pet. App. 12a-13a, 15a). There is no meaningful distinction between the walking time at issue in this litigation and the example of "walking or riding by an employee between the plant gate and employee's lathe, workbench or other actual place of performance of his principal activity or activities" set forth in the Secretary's regulations. Moreover, the Secretary's regulations, borrowing from *Steiner*, make clear that under "the conditions normally present" waiting time is a noncompensable preliminary activity. The First Circuit appropriately recognized that the regulations indicate "that a reasonable amount of waiting time is intended to be preliminary or postliminary." *Tum*, 360 F.3d at 282. The court noted that "a line must be drawn, otherwise an almost endless number of activities that precipitate the employees' essential tasks would be compensable." *Id.*

The First Circuit further recognized below that "nothing in *Steiner* requires" the conclusion that compensable donning

commences the workday and that the workday continues until the last act of compensable doffing is performed. *Tum* 360 F.3d at 281. Concurring, Chief Judge Boudin recognized the implications of the extension of *Steiner* urged here, noting that "the more serious problem for employers arises in cases such as this one by attempts to extend *Steiner* further to walking and waiting incident to such donning and doffing. This of course may greatly extend the amount of time in question and may seem especially incongruous where the amount of time spent in actually donning and doffing clothes and equipment is generally pretty minimal." *Id.* at 284.

The notion that some preliminary and postliminary activities (as defined by the Portal-to-Portal Act) are integral and indispensable to a principal activity and therefore compensable originated with the Court's decision in *Steiner*. The Portal-to-Portal Act contains no such concept. Contrary to the assertions of the Secretary here, however, the Court in *Steiner* held that such preliminary and postliminary activities are "integral and indispensable" only in extreme and unusual circumstances such as those in *Steiner*.

In its opinion in *Steiner*, the Sixth Circuit found that the showering and clothes-changing activities were compensable, specifically relying on findings by the district court that "[t]he use of sulphuric acid involves the probability of deteriorating the clothing, and in some cases, of burning the skin of those who have occasion to handle it" and that "'[s]torage battery manufacture is recognized by the experts as one of the most hazardous of the lead-using industries.'" *Steiner v. Mitchell*, 215 F.2d 171, 174 (6th Cir. 1954). Thus *Steiner*, like the regulations, makes clear that "preliminary" or "postliminary" activities will be found to be integral and indispensable to the principal activity only in narrow and unique circumstances.

The *Steiner* decision has been widely recognized as a narrow holding limited to its "unique facts." *See Tum*, 360 F3d at 281 (Boudin, C.J., concurring) (observing that in *Steiner*,

"the dangers were extreme and unique to the job"); *Reich v. IBP, Inc.*, 820 F. Supp. 1315 (D. Kan. 1993) (characterizing the *Steiner* decisions as "very narrow and closely tied to the extreme facts presented by the case," including the "toxicity of the materials involved in manufacturing batteries and discussed at length the dangers inherent in working with such materials"); *see also Reich v. N.Y. City Transit Auth.*, 45 F.3d 646, 650 (2nd Cir. 1995) (noting that the Supreme Court found that the activities in *Steiner* were integral and indispensable "given the high risks to employee safety"); *Aguilar v. United States*, 36 Fed. Cl. 560, 566 (1996) (stating that "[t]he exception fashioned in *Steiner* narrowly construed the phrase 'principal activity' and found only a limited exception, expressly compelled by health, hygiene, and safety considerations. *Steiner* went to great lengths to emphasize that changing clothes and showering are not compensable under 'normal' circumstances").

Any potential health risks that might arguably be faced by meat and poultry processing workers are not comparable to those present in *Steiner*, in which employees were exposed to acid, lead, and other corrosive materials. *Steiner*, 350 U.S. at 249-50. The fact that, in the very limited circumstances present in such a hazardous work environment as that described in *Steiner*, pre-shift and post-shift activities can be found to be integral and indispensable to a principal activity in no way supports a conclusion that the walking or waiting time of employees in this case is compensable. Indeed, *Steiner* did not specifically address waiting time and carved out walking time. It is clear that any walking or waiting associated with the donning and doffing activities at issue in this case are neither a principal activity nor integral and indispensable to a principal activity under *Steiner*.

As Chief Judge Boudin recognized below, the Secretary's position set forth in the Department of Labor's (hereinafter "DOL") amicus brief is "a substantial step beyond *Steiner*."

Tum, 360 F.3d at 286. Petitioners therefore urge this court to expand the exception of *Steiner* to the point that the exception will swallow the rule established by the Portal-to-Portal Act. Such a holding would represent a return to the same expansive definition of "compensable activities" that prompted Congress, in 1947, to enact the Portal-to-Portal amendments.

III. NONE OF THE VARYING RATIONALES OFFERED IN SUPPORT OF PETITIONERS' ADVOCATED RETURN TO THE REJECTED REASONING OF *MT. CLEMENS POTTERY* ARE SUPPORTED BY THE LANGUAGE OF THE STATUTE.

That petitioners and their supporting *amici* lack statutory support for the radical and wholesale revision of the concept of the compensable workday which they advocate is most clearly demonstrated by the variety of fictitious rules of law which they have conjured in place of actual statutory support. These varying rationales, however, do share one common characteristic—they are contrary to the language and purpose of the Portal-to-Portal Act.

A. The Statute Does Not Support The "First Principal Activity" Standard Advocated By Petitioners

Petitioners argue that under *Steiner*, "donning and doffing constitute part of the petitioners' principal activities. And because they are the first and last principal activities of the day, the donning and doffing process marks the boundaries of the petitioners' workday" (Pet. Br. at 10.) The Secretary of Labor similarly advocates the "first principal activity" standard as defining the compensable workday. The Secretary asserts that:

> Thus, absent contract or custom, the Portal Act excludes from compensation travel and other preliminary and postliminary activities when they occur before employ-

> ees begin their first principal activity or after they conclude their last principal activity of the day. Travel and other activities that occur between the first and last principal activities of a workday, however, are not excluded from compensation by the Portal Act.

(Br. of the United States as *Amicus Curiae* at 4).

In response to specific questions posed by the First Circuit below, the Secretary submitted a brief setting forth the Secretary's position on the compensability of walking time that follows compensable donning or precedes the last compensable doffing activity. Before the First Circuit, the Secretary advocated a definition of the compensable workday based upon employees' first and last "principal activities." The First Circuit recognized the Secretary's "first principal activity" argument as a "litigation position" and rejected the Secretary's position that the workday began with an employee's first, and ended with an employee's last, principal activity. *Tum*, 360 F.3d at 281. The First Circuit rightly rejected this expansion of compensable activities, recognizing that this reasoning would "undermine" the very purpose of the Portal-to-Portal Act. *Id.* at 281.

With regard to this novel interpretation of the FLSA urged by the Secretary, the First Circuit observed that "[t]he [S]ecretary urges an expansion of the ordinary 'workday' rule in favor of a broader, automatic rule that any activity that satisfies the 'integral and indispensable' test itself started the workday, regardless of context." *Id.* at 280. Citing *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002),[2] and *Reich v. IBP, Inc.*, 38 F.3d 1123 (1st Cir. 1994) the Court further warned that "the Secretary's present litigation position in our

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[2] Fifth Circuit Local Rule 47.5.4 permits citation of unpublished decisions as persuasive authority.

view, pushes so far that it threatens to undermine the Portal-to-Portal Act." *Tum*, 360 F.3d at 281.

The contention that donning and doffing constitute first and last principal activities, and, that the FLSA requires compensation for intervening time spent walking, was expressly rejected by the Tenth Circuit in *Reich v. IBP, Inc.*, 38 F.3d 1123. In *Reich*, the court held that:

> [d]espite having found that putting on, cleaning, and taking off the unique personal protective gear was a compensable work activity, the district court nevertheless declined to hold that these actions were the first and last principal activities of the workday which would commence and toll the running of the timeclock, including "wait and walk time." The district court found that there existed considerable flexibility and personal discretion with regard to the time and speed that these activities took place. . . . Given these circumstances, the district court concluded that the workers should be paid on the basis of reasonable time to conduct these activities not to include "wait and walk time." . . . We affirm . . . the denial of "wait and walk time" related to the above issues.

38 F.3d at 1127.[3] Similarly, as noted by the First Circuit below, the Fifth Circuit affirmed without published opinion a decision dismissing nearly identical claims by poultry work-

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[3] In *Reich v. IBP*, the donning and doffing activities of knife-wielding meat processing employees were found to be compensable, while similar activities of non-knife-wielding employees were found to be noncompensable. 38 F.3d at 1125-26. The interpretation offered by petitioners in this case would create the following anomaly: knife-wielding employees in such circumstances, once they have performed the "first principal activity" of donning would be compensated for waiting time and for time spent walking to the work station. Non-knife-wielding employees in the same workforce, however, would not be compensated for such waiting and walking time because their donning and doffing activities are not compensable. Any interpretation of the statute that yields such a result is clearly in conflict with the statute's plain meaning.

ers for compensation for time spent walking to and from their work stations. *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 563 n.12 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002). The First Circuit's opinion below, *Reich v. IBP*, and *Pilgrim's Pride* reflect a longstanding interpretation of the Portal-to-Portal Act that has persisted over many decades for a good reason—it is faithful to the clear language of the statute.

B. There Is No "Continuous Workday Rule" Which Compels The Interpretation Of The Act Advocated By Petitioners

Petitioner's arguments also rest on the erroneous assertion that "[t]here is nothing in the statute on regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done." (Pet. Br. at 24-25) (quoting *Alvarez v. IBP,* Inc., 339 F.3d 894, 907 (9th Cir. 2003)). In the history of the FLSA there have been innumerable circumstances in which the DOL and the courts have found that the "workday" is anything but continuous. Indeed, the Secretary's regulations recognize that the "workday" may often be "discontinuous".

The Secretary's regulations have long recognized that work performed away from an employer's premises or at home, after the completion of an employee's normal shift, is compensable. 29 C.F.R. 785.12. (regulations pertaining to working time apply "to work performed away from the premises or the job site, or even at home"). Additionally, the regulations recognize that work performed during travel, but not the travel time itself, is compensable. 29 C.F.R. 785.41.

The "First Principal Activity" standard and "Continuous Workday Rule" asserted by petitioners and supporting *amici* are also in conflict with the opinions of numerous courts of appeals that have rejected such reasoning in addressing the

compensability of travel time for police dog handlers. For example, in *Reich v. N.Y. City Transit Auth.*, 45 F.3d 646 (2nd Cir. 1995), dog handlers employed by the New York Transit Authority Police Department sought compensation for time spent commuting with their dogs. Each handler had sole responsibility for the care of his or her dog and was required to groom, feed, walk, train, house, and otherwise care for the dog. *Id.* at 648. The dog handlers were not permitted to travel to work using public transportation but were required to use their personal vehicles to transport the dogs to and from work. *Id.* The Second Circuit rejected the argument of the Secretary that, because the handlers were required to perform compensable activities related to caring for the dogs, the travel time to and from work was, therefore, compensable. The court concluded that:

> the time spent by handlers driving to and from work with their dogs, except to the extent that actual duties of care, feeding, training, walking or cleaning up occur during such commute, is not compensable work. Such true dog-care work occurring during the commute, however, is not exempted from compensation by the Portal-to-Portal Act.

Id. at 652. Both the Federal Circuit and the Sixth Circuit have reached similar conclusions. *See Bobo v. United States*, 136 F.3d 1465, 1468 (Fed. Cir. 1998), and *Aiken v. City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000). These courts rejected the reasoning of *Graham v. City of Chicago*, 823 F.Supp. 576 (N.D. Ill. 1993), in which the court had applied the "first principal activity" analysis to find that travel time which followed compensable dog care activities was also compensable. The *Graham* analysis has been widely rejected and criticized. *See e.g. Adams v. United States*, 10 WH Cases 2d 1000, 1014 (Fed. Cl. 2005) (observing that "[t]he *Graham* analysis appears to be an interpretation of the Portal-to-Portal Act which is in a distinct minority and is probably no longer good law."); *Dooley v.*

Liberty Mutual Ins. Co., 307 F.Supp. 2d 234, 248 (D. Mass. 2004) (stating that "*Graham* remains, but it is contradicted by extensive case law reaching the opposite conclusion.")

These decisions reject the proposition that the performance of some compensable activity prior to or during travel time (which under § 4(a)(1) is indistinguishable from walking time) commences the workday and renders such travel time compensable. In contrast, under the arguments advanced by petitioners, if a police dog handler's commute to work followed compensable dog care activities, the time spent commuting would be compensable. Under section 4(a)(1) of the Portal-to-Portal Act, there is no distinction between time spent "walking," "riding," or "traveling," to a workplace. 29 U.S.C. § 254(a). This is precisely the type of "absurd" result the First Circuit below recognized would follow from the reasoning of the Secretary. The court observed that "[t]his extension overreaches and would lead to the absurd result that an employee who dons required equipment supplied by the company at 5:00 a.m., at this home, starts his workday for FLSA purposes at 5:00 a.m.—even though he is not required to punch in to work and does not punch in until 8:00 a.m. This plainly cannot be what Congress intended." *Tum*, 360 F.3d at 280-81.

The concept of a universally mandatory "continuous workday" is a figment of petitioners' imagination. To the contrary, as found by the First Circuit below, the Tenth Circuit in *Reich v. IBP*, and the Second Circuit in *Reich v. N.Y. City Transit Auth.*, time spent traveling to or from the place where one's principal work is performed is not rendered compensable as a result of the previous or intermittent performance of pre or post-shift compensable duties. Consistent with this reasoning, the Secretary's regulations additionally provide that:

> [w]ashing up after work, like the changing of clothes, may in certain situations be so directly related to the

> specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity." . . . This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

29 C.F.R. § 790.7, n.49 (Pet. App. 15a). The arguments of the petitioners and their supporting *amici* (which include the DOL) are difficult to reconcile with this longstanding regulation upon which employers have relied for decades.

Apparently recognizing the vast liabilities that would result from judicial adoption of the "first principal activity" standard, the Secretary offers to mitigate its effects by conceding that "when an employee has the option to don and doff required clothing and gear at home, that activity is not integral, not compensable, and does not begin or end the workday." (Br. of the United States as *Amicus Curiae* at page 23). The problem with this exception to the "first principal activity" standard is that, like the first principal activity standard itself, it is not supported by the statute and is contradicted by the Secretary's regulations.

As discussed below, an action that is a "principal activity" is compensable under the Portal-to-Portal Act unless it is *de minimis*. That it is performed at home is of no consequence under the Secretary's regulations (*see* 29 C.F.R. 785.12 discussed above) and numerous well reasoned cases (*see Reich v. New York Transit Authority*, 45 F.3d 646 and related cases discussed above). There is no statutory basis for treating principal activities performed at home differently than principal activities performed at the job site. Neither the FLSA nor the Portal-to-Portal amendments make such a distinction. Moreover, the effort required to perform any donning or doffing is identical whether such activity occurs at home or

on the employer's premises. The First Circuit recognized the fallacy of the Secretary's proffered exception to the first principal activity standard observing that "[t]he Secretary offers a fallback position that the workday starts with any donning or doffing of required gear so long as it is done on company property. But the logic of the Secretary's position does not permit such a narrowing, nor does the Secretary's fallback argument make sense in a world, for example, in which not all employees who perform work that is compensable under the FLSA do so at a facility owned and run by their employer." *Tum*, 360 F.3d at 281.

At the time the Portal-to-Portal Act was passed, or at anytime since, Congress could have adopted "a continuous workday rule" or a "first principal activity" standard for determining the scope of the compensable workday. Congress, however, has not done so. Such a radical revision of the compensable workday could only be accomplished through legislative action—not judicial fiat. This is particularly true where the revision of the statute being advocated is directly contrary to the purpose which prompted Congress to enact the Portal-to-Portal Act in the first place. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951).

IV. THE "FIRST PRINCIPAL ACTIVITY" OR "CONTINUOUS WORKDAY" STANDARDS ADVOCATED BY PETITIONERS WOULD ERADICATE THE *DE MINIMIS* RULE.

The rule that *de minimis* activities are not compensable under the FLSA, even when such activities are integral and indispensable to a compensable activity, has a long history. This Court recognized the *de minimis* concept in *Mt. Clemens*. In *Mt. Clemens* the court observed that:

> [w]e do not, of course, preclude the application of a *de minimis* rule where the minimum walking time is such as to be negligible. The workweek contemplated by § 7(a)

> must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act.

328 U.S. at 692. The regulations also provide that insignificant periods of time outside of an employee's normal working hours may be disregarded. 29 C.F.R. §785.47. Courts have on numerous subsequent occasions applied the *de minimis* rule to find that preliminary or postliminary activities were not compensable, even where such activities were found to be integral and indispensable as defined in *Steiner*. *See e.g. Aiken v. City of Memphis*, 190 F.3d 753, 759 (6th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000); *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984).

If the interpretation of the FLSA advocated by petitioners could be supported by the statutory language, the *de minimis* rule could never have come into existence and certainly would not have persisted throughout six decades of subsequent application. If the Court were to adopt the radical revision of the FLSA advocated by petitioners, however, the *de minimis* rule would thereby be abolished. If associated walking and waiting time were to be aggregated with preliminary or postliminary donning and doffing activities, it is difficult to conceive of any circumstances under which the *de minimis* rule would have any further application. The clear language of § 4 of the Portal-to-Portal Act does not require or even allow such an absurd result. Rather, the court below properly applied the long standing *de minimis* rule to find that the activities at issue in this case were not compensable.

Petitioners here seek to upend longstanding precedent to achieve a windfall. It was recognized in the Congressional debate which produced the Portal-to-Portal amendments and

has been recognized by this Court that any such windfall would be short-lived. *Mt. Clemens*, 328 U.S. at 698 (J. Burton, dissenting); *Jewell Ridge Coal Corp.*, 325 U.S. at 169, 176. Any employer which has established its wage rates in reliance upon longstanding interpretations of the FLSA which excluded walking and waiting time from the compensable workday will, if the workday is redefined as advocated by petitioners, simply revise wage rates accordingly. Revised wage rates would be necessary to offset the costs associated with longer periods of heretofore non-compensable time as well as costs associated with revising timekeeping practices and systems to capture time spent performing ancillary activities. Petitioners even go so far as to suggest that employers should be burdened with redesigning their workplaces so that walking and waiting time can be monitored with precision (Pet. Br. at 33). It should be noted, moreover, that such costs would be imposed on large and small employers as well as public and private employers.

The effects of the revision of the concept of the compensable workday advocated by petitioners would be profound and widespread. As Justice Burton recognized in *Mt. Clemens*, for the Court to include in the compensable workweek "items that have been customarily and generally absorbed in the rate of pay but excluded from measured working time is not justified in the absence of legislative action." 328 U.S. at 698 (J. Burton, dissenting).

CONCLUSION

For the foregoing reasons, *amici* organizations respectfully urge the Court to reverse the judgment of the Ninth Circuit in *Alvarez*, and affirm the judgment of the First Circuit in *Tum*.

Respectfully submitted,

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